FILED

No. 97 1610 MAR 24 1998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

IN THE MATTER OF BUNKER GROUP, INC., BUNKER GROUP PUERTO RICO, INC., NEW ENGLAND MARINE SERVICES, INC.,
Petitioners,

—v.—

UNITED STATES OF AMERICA, *et al.*,
COMMONWEALTH OF PUERTO RICO, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On January 7, 1994 while en route from San Juan, Puerto Rico to St. John, Antigua, the tow wire between the Tug EMILY S and the Tank Barge MORRIS J. BERMAN parted resulting in the MORRIS J. BERMAN grounding on a reef off of Punta Escambron, San Juan, Puerto Rico, which caused a portion of its cargo of No. 6 fuel oil to spill into the water.

As a consequence of the above, owners of the Tug filed a complaint under the Limitation of Liability Act of 1851. Pursuant to Rule F(3) of the Supplemental Rules for Certain Admiralty Claims, the District Court issued an order which created a concursus of all claims in the limitation proceedings and enjoined the commencement of any actions outside the limitation proceeding. Subsequently, the District Court modified the order allowing, generally, the filing of late claims and the commencement of proceedings outside the limitation action in contravention of Rule F concursus provisions. The First Circuit Court of Appeals upheld this order.

Petitioners are the bareboat charterers and operators of the Tug EMILY S. This petition for a writ of certiorari presents the following questions for review:

1. Did the enactment of the Oil Pollution Act of 1990 (OPA 90), 33 U.S.C. §§ 2701-61 implicitly repeal Fed. R. Civ. P. Supp. Rule F when there is *no* mention of Rule F whatsoever in OPA 90 statute, the legislative commentaries and specifically no reference to the Rule F(3) provision for concursus?

2. Did the enactment of OPA 90 implicitly repeal all aspects of the Limitation of Shipowners Act of 1851, (Limitation Act), 46 U.S.C. App. §§ 181-96 as it applies to oil spills by vessels when OPA 90 only explicitly modified the Limitation Act's calculation of the amount of the limitation fund from the value of the vessel plus freight to one governed by statute; and modified the definition of owner/responsible party?

LIST OF INTERESTED PARTIES PURSUANT TO RULE 29.1

1. The Board on Environmental Quality of the Commonwealth of Puerto Rico
2. The Department of Natural Resources of the Commonwealth of Puerto Rico
3. Metlife Capital Corporation, Inc.
4. New England Marine Services, Inc.
5. Bunker Group Puerto Rico, Inc.
6. Caribbean Petroleum Corporation, Inc.
7. Global Insurance Company, SA
8. Utica Mutual Insurance Company
9. American Home Assurance Company
10. Reliance National Insurance Company
11. The Travelers Insurance Company
12. Westchester Fire Insurance Company
13. Royal Insurance
14. Reliance Insurance Company of New York
15. Royal Insurance Company of America
16. Continental Insurance Company
17. Certain Underwriters through Insco Marine, Inc.
18. Certain Underwriters Through Insco Marine Property & Casualty, Limited
19. Water Quality Insurance Syndicate
20. London & Hull Maritime Insurance Company, Ltd.
21. Axa T A/c
22. Yorkshire Insurance Co., Ltd. L A/c
23. Norwich Union Fire Ins. Society, Ltd. No. 1 A/c
24. Cornhill Insurance P/c D A/c, Phoenix Assurance P/c
25. Phoenix Assurance P/c Lsa A/c, Zurich re (Uk) Ltd.
26. Hansa Marine Insurance Company (Uk) Ltd.
27. Prudential Assurance Company Ltd. Trust A/c No. 2
28. Sphere Drake Insurance Plc No. 2 A/c
29. Dai Tokyo Insurance Co. (Uk) Ltd.
30. Anglo American Insurance Company Limited

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CITATIONS TO OPINIONS BELOW

The District Court order is not reported officially, but is contained in Appendix A and the opinion of the Circuit Court of Appeals for the First Circuit is reported at 132 F.3d 818 (1st Cir., 1997) and appears in Appendix B.

JURISDICTION

The underlying District Court action, *In the Matter of Bunker Group, Inc. et al.*, Civ. 94-1917, consolidated with *The Commonwealth of Puerto Rico, et al. v. The Emily S, et al.*, Civ. 94-1019 (CCN), was brought under the Limitation of Shipowners Act of 1851, 46 U.S.C. § 181 *et seq.* ("Limitation Act"), and Fed. R. Civ. P. Supp. Rule F for Certain Admiralty and Maritime Cases ("Rule F"). Accordingly, the jurisdiction of the District Court was founded on the court's admiralty and maritime jurisdiction under 28 U.S.C. § 1333.

Petitioners Bunker Group, Inc., Bunker Group Puerto Rico, Inc. and New England Marine Services, Inc. had appealed the District Court's order dated June 28, 1996 and entered July 12, 1996, modifying the injunction issued by the District Court dated August 25, 1994. The Petitioners' Notice of Appeal was timely filed on August 7, 1996. Since the District Court's June 28th Order modified an earlier injunction, the Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a).

Petitioners have appealed the judgment in favor of Respondents entered on December 24, 1997, and now invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1254(1) to request certiorari to review the judgment of the Court of Appeals for the First Circuit that was entered on the date above mentioned.

STATUTES, RULES AND REGULATIONS INVOLVED

33 U.S.C. §§ 2701-61; 46 U.S.C. App. §§ 181-96; Fed. R. Civ. Supp. Rule F for Certain Admiralty and Maritime Cases.

STATEMENT OF THE CASE

On January 7, 1994, the Tank Barge MORRIS J. BERMAN was being towed by the Tug EMILY S from San Juan, Puerto Rico to St. John, Antigua when the tow wire parted and the MORRIS J. BERMAN drifted free from the Tug. The barge subsequently grounded on a reef off of Punta Escambron, San Juan, Puerto Rico. The grounding ruptured a number of the MORRIS J. BERMAN's cargo tanks spilling a large part of its cargo of no. 6 fuel oil into the water.

As a result of the grounding of the MORRIS J. BERMAN, and the ensuing oil spill, the Commonwealth of Puerto Rico ("Commonwealth") filed a damages action in the United States District Court for the District of Puerto Rico captioned *The Commonwealth of Puerto Rico v. M/V EMILY S, et al.*, No. 94-1019(CCC). The Commonwealth named numerous defendants in this action including: Bunker Group, Inc. ("BGI") and New England Marine Services, Inc. ("NEMS"), the bareboat charterers of the EMILY S; Bunker Group Puerto Rico, Inc. ("BGPR"), operator of the EMILY S; MetLife Capital Corp. ("MetLife"), the owner of the EMILY S; and the EMILY S *in rem*.[1]

On July 1, 1994, NEMS, BGI, and BGPR (collectively, the "Petitioners") filed a complaint under the Limitation of Shipowner's Liability Act of 1851 ("Limitation Act") seeking exoneration from or limitation of liability for claims arising out of the grounding of the Tank Barge MORRIS J. BERMAN. At the same time, MetLife, as owner of the EMILY S, filed a separate complaint under the Limitation

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[1] Numerous other civil actions were filed by private parties seeking recovery under a variety of theories for damages that were allegedly caused by the oil spill from the MORRIS J. BERMAN. These actions were either consolidated with the Commonwealth's action or were later dismissed. On January 7, 1997, the United States filed a separate action in the District of Puerto Rico seeking recovery of damages under the Oil Pollution Act of 1990 ("OPA 90"), and other laws. This lawsuit has also been consolidated with the Commonwealth's action.

Act. Pursuant to Rule F(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims, the Court issued an order of injunction restraining the prosecution of claims. Pursuant to Rule F, this order created a concursus of all claims in the limitation proceedings by enjoining the commencement and/or further prosecution of any actions against the Petitioners with respect to the grounding of the MORRIS J. BERMAN outside of the limitation proceedings. Thereafter, numerous claimants filed claims in the limitation proceedings, including the Commonwealth of Puerto Rico and the United States, seeking recovery of damages under OPA 90 and general maritime law. The claims filed by the United States and the Commonwealth assert that their OPA 90 claims should not be subject to the concursus.

Three other claimants, Hilton International of Puerto Rico, Inc., Puerto Rico Tourism Company and Hotel Development Corporation each filed a petition and/or motion[2] with the District Court generally seeking an amendment to the District Court's August 25, 1994 notice and order to allow, generally, the filing of late claims in the limitation proceedings, and also requested that the District Court stay the limitation proceedings pending the resolution of Hilton and Tourism's administrative claims before the National Pollution Funds Center ("NPFC").

On June 28, 1996, in deciding the above three claimant's petition and/or motion, the District Court issued an order, which was entered on July 12, 1996, and which suspended the August 25, 1994 "Order of Injunction" issued in the limitation proceedings "to the extent that it stays any claims for oil spills removal costs or damages resulting from or in any way

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[2] The Puerto Rico Tourism Company and the Hotel Development Corporation each initially filed a Petition for Dismissal or Stay of Proceedings. Hotel Development Corporation also filed a joint motion with Hilton International of Puerto Rico, Inc. to Amend Order and Notice, to Stay Proceedings, or in the alternative, to relax the Monition Period. The Order by the District Court dated June 28, 1996 ruled on all the above.

connected with the grounding of the Tank Barge MORRIS J. BERMAN on January 7, 1994." Petitioners contend that the District Court erred in entering this order.

On August 7, 1996, the Petitioners and MetLife timely filed an appeal of the June 28, 1996 order. The Appellate Court upheld the Order by its decision dated December 24, 1997, in which the Court held that "we find that the OPA 90 has repealed the Limitation Act as to oil spill pollution claims under the OPA 90 in the instant case." The Appellate Court erroneously reasoned that since OPA 90 explicitly precluded application of the Limitation Act regarding oil spills on the navigable waters of the United States, Rule F of the Supplemental Rules for Maritime and Admiralty claims, which is not even mentioned in OPA 90, must also have been repealed by OPA 90 by implication.

Prayer for a Writ of Certiorari

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the First Circuit entered in the above case on December 24, 1997, which Judgment affirmed the District Court's modification of the above-mentioned order dated August 25, 1994 and erroneously held that, based upon OPA 90's explicit preclusion of the application of the Limitation Act to OPA 90 claims, Rule F was also precluded by implication. Petitioners seek certiorari in accordance with Rule 10 of this Court which provides for a review of an appellate court opinion which "has so far departed from the accepted and usual course of judicial proceedings" or has affirmed such a departure by a lower court.

ARGUMENT

THE ENACTMENT OF OPA 90 DID NOT REPEAL FED. R. CIV. P. SUPP. RULE F OF CERTAIN ADMIRALTY AND MARITIME CLAIMS ("RULE F"), SINCE THERE WAS NO MENTION OF RULE F WHATSOEVER IN OPA 90 AND SPECIFICALLY NO REFERENCE TO THE RULE F(3) PROVISION FOR CONCURSUS.

In *The Quarrington Court*,[3] the Court comprised of Learned Hand, Augustus Hand and J. Chase stated:

> "the purpose of a limitation proceeding is not merely to limit liability but to bring all claims into concourse and settle every dispute in one section . . . . The general desirability of bringing all claims into concourse when once a limitation proceeding has been instituted and the plain jurisdiction of the court to effect such a result was clearly stated by the Supreme Court in *Hartford Accident Co. v. Southern Pacific Co.*, 273 U.S. 207, 215; 1927 A.M.C. 402, 406".

This principle has been shattered by the ruling of the First Circuit in this case, at least with respect to oil pollution incidents giving rise to claims under OPA 90. In its wake, the First Circuit has left an unworkable and ultimately harmful situation that will result in a multiplicity of lawsuits, inconsistent judicial decision, and deprivation of the substantive right to limitation which Congress has so clearly given to vessel owners and operators in OPA 90.

Petitioners do not challenge the First Circuit's holding that OPA 90 precluded application of the Limitation Act with respect to the amount of a shipowner's (or operator's) liability in the event of a pollution incident. Specifically, it is clear

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[3] *The Quarrington Court*, 102 F.2d 916 (2d Cir.) *cert. denied*, 307 U.S. 645, 1939 A.M.C. 421.

that the calculation of the limitation fund changes from the value of the vessel plus any pending freight (under the Limitation Act) to the limitation amount set forth in OPA 90. Additionally, OPA 90 expanded the definition of owner/responsible party to include third parties which are not owners of the spilling or discharging vessel, but which solely caused the spill. However, petitioners do challenge the First Circuit's unwarranted finding that since the Limitation Act is "repealed" with respect to claims arising from oil pollution incidents,[4] the procedural concursus for the marshaling of claims applicable to all admiralty matters under Supplemental Rule F is also therefore repealed by OPA 90. That holding goes too far. Rule F applies to all admiralty matters where limitation, such as is found under OPA 90, may apply. To abrogate the concursus procedure in such cases not only makes no sense, it may deprive the shipowner (or operator) of its substantive right to limitation of liability.

The origins of Rule F are found in this Court's promulgation in 1872, of Admiralty Rules 54-57[5], twenty one years after the original Limitation Act was passed. The Admiralty Rules were redrafted in 1920.[6] The Admiralty Rules essentially remained unchanged during the modifications of the Limitation Act in the 1870's[7] and of 1936.[8] However, it should be noted that Admiralty Rule 51 was largely superceded by the 1936 Amendment when the Amendment extended the time for an owner to commence a limitation

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4 132 F.3d 822.

5 Admiralty Rules 54-57, 80 U.S. pp. xiii-xiv (1872).

6 Actually, the Admiralty Rules 51-55, as numbered, were promulgated by the Court on December 6, 1920 and simply recodified the 1872 Admiralty Rules. See Order of February 28, 1966 § 4, Orders of the Supreme Court Adopting And Amending Rules.

7 See *supra*, footnote 5; see also Revised Statutes, 1874 (R.S. 4281-7 & 4289).

8 Act of June 5, 1936, c.521, 49 State at L. 1479; 1936 A.M.C. 920.

action from three to six months and modified the rule regarding the posting of security. In 1966, by Congressional Order,[9] this Court consolidated the Federal Civil Procedure Rules with the Admiralty Rules of Procedure which was then adopted as law. Thus, Supplemental Rule F was born.

From its inception in 1966, the plain meaning of Rule F clearly shows that this Court never meant Rule F to be solely applicable to the Limitation Act. In fact, Rule F was a merger, reconciliation and expansion of the Admiralty Rules #51-54, the 1936 modification of the Limitation Act and was intentionally broadened to encompass further modifications to the Limitation Act as well as any supplemental related acts.[10]

The Court below concedes that Rule F, as drafted, is applicable to more than just the Limitation Act.[11] The "more general purpose for Rule F"[12] recognized by the court below means that *any* statute which limits liability in a maritime and admiralty context should follow Rule F. It does not matter whether the limitation is by statute under OPA 90,[13] under CERCLA,[14] under the Trans-Alaska Pipeline Authorization

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9 28 U.S.C. § 331 (1964 ed.)

10 For example, under Rule F(1) "not later than six months after receipt of a claim in writing any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability *pursuant to statute* . at the owner's option, [owner] shall transfer to a trustee to be appointed by the Court, for the benefit of the claimants, the owner's interest in the vessel and pending freight, together with such sums *or approved security therefore, as the Court may from time to time fix as necessary to carry out the provisions of the statutes as amended.* [emphasis added].

11 "In redrafting the rules, the Supreme Court substituted a direct reference to the 1851 statute in Rule F with "pursuant to statute" language which we find reveals more general purpose for Rule F". 132 F.3d 818, 822.

12 *Id.*

13 See 33 U.S.C. § 2701-61.

14 See 42 U.S.C. § 9601 et seq.

Act[15] or any other similar act. They all would fall under the procedural structures of Rule F subject, of course, to any explicit modification or preclusion of the application of Rule F by statute. No such modification or preclusion of Rule F appears in OPA 90.

Although the First Circuit finds conflicts between Rule F and OPA 90 with respect to venue and the limitation period, these objections do not bear scrutiny, especially in light of the applicability of the Limitation Act to general maritime law claims, among others. Specifically, the Court below found that the forum requirement of Rule F, that the concursus be lodged in the Federal District Court where the vessel has been seized, or if the vessel has not been seized, in any district in which the owner has been sued, or in the absence of a prior seizure or suit, the district where the vessel is found, is more restrictive than the venue provisions for bringing claims under OPA 90. That may or may not be true. OPA 90 provides that venue is proper in any district in which the discharge of oil or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process.[16]

However, even if venue is more restrictive under Rule F, that should not preclude application of Rule F procedure. To hold otherwise is to say that Rule F should never be applicable, since its venue provisions will always be more restrictive than the venue rights of claimants subjected to Rule F concursus. Certainly that is the case with respect to general maritime law claims, as well as to *Jones Act*[17] claims arising from seaman personal injury cases, which are the most common form of claims subjected to the Limitation Act and Rule F. Nevertheless, it is clear that the benefits of Rule F concursus, as well as its necessity in order to implement the

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15 See 43 U.S.C. § 1651 et seq.

16 33 U.S.C. § 2717(b)

17 46 U.S.C. § 688.

purposes and substantive rights of limitation of liability granted by statute, outweigh any inconvenience to claimants.

The same can be said for the Court's reasoning below that the Rule F monition period should not be applied to OPA 90 claims because the limitation period is more restrictive than that provided under OPA 90. Although the Rule F monition period may shorten the time in which to bring claims, giving claimants less time than they would otherwise be permitted under OPA 90, shortened limitation periods have routinely been applied in Limitation Act cases. This has never formed the basis of a challenge to the Rule F procedure under the Limitation Act, however. It is likely that this is because the District Court where the Limitation Act Complaint is filed always has the inherent power to extend the monition period, if the interest of justice so requires. In this way prejudice to any claimant is avoided.

Finally, the First Circuit noted the potential for prejudice to the United States' subrogation rights due to the time limitation of filing concursus claims. Surprisingly, the First Circuit found that extension of the monition period by the District Court would not cure this problem, stating:

> Moreover, even if the courts consistently enlarge the monition period for subrogation claims, in many instances, the limited fund established by the concursus procedure will already have been exhausted.[18]

This statement is surprising, and wrong, for two reasons. First, as long as the monition period remains open, the distribution of the limitation fund will not occur. The District Court simply would not adjudicate and direct payment of claims while the monition period was still open. Secondly, and more importantly, without a concursus procedure, any later-arising claims by the United States will almost certainly be shut out of recovery by exhaustion of the limitation amount in one or more of

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[18] 132 F.3d 818, 824.

the multiple litigations which the First Circuit decision allows. Simply put, the First Circuit decision allows, and in fact encourages, a race to the courthouse by claimants, which will likely prejudice (or defeat) the United States' subrogated claims. Since the first claimant to obtain judgment can collect up to the statutory limit from the vessel's owner or operator or guarantor, the race is over once the limitation fund is exhausted. Without a concursus, actions will be pending simultaneously in many different courts, with each claimant vying for the first judgment. Thus, the biggest problem for the United States with respect to its later subrogation claims is that the ability of claimants to proceed outside of any concursus, which the First Circuit decision allows, will exhaust the limitation fund before the government can even bring its claims to court. Far from prejudicing the United States' subrogation rights, concursus is the only way to preserve them.

Rule F Concursus

Far from being in conflict, OPA 90 and Rule F complement each other in many aspects. Indeed, the Courts have viewed the Limitation Act proceeding under Rule F as having two primary purposes, both of which are consistent with OPA 90:

1. to establish a limitation fund; and
2. to allow all potential claimants to get a fair hearing by the Court and to have the Court allow an equitable distribution of the limitation fund which will not cover all outstanding claims.[19]

Consistent with the foregoing, and with OPA 90, the purpose of concursus is to allow for the claimants, where the aggregate value of their claims exceed the limitation fund, to have a common forum from which to be heard. It also allows the Court to equitably distribute to each claimant its pro rata share of the

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[19] See *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 415 (1954); See also *The Quarrington Court*, *supra* at 423.

limitation fund. Moreover, it is important to bear in mind that the concursus is not solely for the benefit of the shipowner. The elaborate notice provisions of the Admiralty Rules are also designed to protect injured claimants.[20]

Like the Limitation Act, OPA 90 establishes standards for exoneration and limitation of liability with regard to oil pollution, and provides new limits of liability for such claims.[21] OPA 90 however, does not refer to a limitation procedure at all, nor does its legislative history, and OPA 90 provides no mechanism for the Court to manage claims or to distribute funds that might be available to claimants under OPA 90 if claims against the responsible party exceed the applicable OPA 90 limit. Rule F steps in to fill that gap.

The need for a concursus procedure to marshal all claims arising under OPA 90 is imperative. As stated earlier, Rule F concursus procedure was explicitly broadened by this Court to allow for its utilization in other limitation of liability

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20 *Id.* at 415, 417.

21 OPA 90, § 2704(a) states in pertinent part "except as otherwise provided in this section, the total liability of a responsible party under § 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed—

(1) for a tank vessel (except a tank vessel on which the only oil carried as cargo is an animal fat or vegetable oil, as those terms are used in § 2720 of this title) the greater of—

(A) $1,200.00 per gross ton; or

(B) (i) in the case of a vessel greater than 3,000 gross tons, $10 million; or (ii) in the case of a vessel of 3,000 gross tons or less, $2 million;

(2) for any vessel, 600 per gross ton or $500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus $75 million; and

(4) for any onshore facility and deepwater port, $350 million.

schemes. OPA 90 is a limited liability scheme and application of Rule F concursus procedure is essential for the proper management of the funds available to pay claims under OPA 90. Rule F concursus is the only way to ensure that all claimants will obtain a fair pro rata share of recoverable damages from a responsible party under OPA 90.[22] In the absence of concursus, there is a very real threat of multiple suits in multiple jurisdictions, races to the courthouse (and to trial and to judgment) by claimants, extreme waste of judicial resources, and conflicting judicial decisions on liability. The claimant that won the race to judgment and exhausted the limitation fund would effectively shut out the other claimants from recovery. And this is no matter how long the others had been in litigation. Once a responsible party has paid its OPA 90 liability limit, it should have no more liability to the claimants; whose remedy would then be to seek recovery from the supplemental compensation fund created by OPA 90. This fund is commonly known as the Oil Spill Liability Trust Fund which is managed by the NPFC. If that is not the case (and conflicting decisions in State and Federal District Courts may threaten the shipowner's ability to successfully assert a defense of limitation) then the substantive right of limitation will be lost.

OPA 90 Did Not Repeal Rule F By Implication

Just as Congress did not explicitly repeal Rule F, fundamental principles of statutory construction require a finding that it did not effect such repeal by implication. Repeal of statutory provisions by implication is strongly disfavored.[23] Generally, repeal is implied only when necessary to make a later enacted law work, and then only to the minimum extent

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[22] Note that claimants are not precluded from further recovery under OPA, however. If they only receive a portion of their claim from the OPA responsible party, they may apply to the NPFC for payment of the remaining amount due. *See* 33 U.S.C. § 2713(d).

[23] *See e.g., Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 189 (1978).

necessary.[24] Thus, absent a clear and manifest intention by the legislature to repeal, when two statutes exist on the same subject, the rule is to give both effect if at all possible.[25] Indeed, no repeal will be implied unless the provisions demonstrate a mutual exclusivity, positive repugnance, or clear irreconcilability such that the two acts cannot have concurrent operation.[26] Absent such repugnance, courts should make every effort to reconcile the two acts and give effect to both so long as doing so does not deprive one or the other of its essential meaning.[27]

In this case, Rule F's procedure for concursus and OPA 90's liability provisions are entirely consistent and must both be given full effect. Although OPA 90 creates new limits of liability for damages resulting from oil pollution, it does not address the limitation procedures set forth under Rule F. Just as there was no explicit repeal of the concursus provisions of the Limitation Act, there is no "mutual exclusivity, positive repugnance, or clear irreconcilability" between the terms of OPA 90 and Rule F that would require implicit repeal of Rule F. Indeed, neither OPA 90 nor its legislative history provide a competing procedure for a responsible party to follow in order to assert limitation under OPA 90. Far from being inconsistent with OPA 90, the Rule F remains the only procedure that a responsible party and the Court can reasonably follow in attempting to assert and manage numerous claims under a limited liability scheme such as OPA 90.

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24 *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). *See also Morton v. Mancari*, 417 U.S. 535, 550 (1974) (where in the absence of an affirmative showing of an intent to repeal, when two statutes or doctrine are capable of coexisting, it is the duty of a court to regard each as effective).

25 *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

26 *U.S. v. Hansen*, 566 F.Supp. 162, 164-165 (D.DC. 1983).

27 *Id.* at 165.

Furthermore, as noted above, OPA 90 expressly states that except where otherwise provided, OPA 90 does not effect existing admiralty and maritime law.[28] OPA 90, analagous to the Limitation Act, does not otherwise provide, and neither OPA 90 nor its legislative history address, the issue of limitation procedure. Thus, there can be no other conclusion but that Rule F's concursus procedure remains unaltered by OPA 90. And that Rule F remains applicable to OPA 90's limitation of liability scheme.

As a result of the decision below, any OPA 90 claimant can now file their claim in any court, and the claimant that gets to the right court and gets a judgment first will have first "bite of the apple" of a fund which may not cover all the legitimate claims. For the reasons set forth above, we ask this Court to grant certiorari to correct a clear error by the Court below. By ruling that OPA 90 supersedes both the Limitation Act *and* Rule F, the Courts below have discarded over one hundred years of *stare decisis*, much of which was set by this Court, and created a judicial morass.

THE ENACTMENT OF THE OIL POLLUTION OF ACT 1990 (OPA 90), DID NOT REPEAL THE LIMITATION OF SHIPOWNERS LIABILITY ACT SINCE OPA 90 ONLY MODIFIED THE LIMITATION ACT WITH RESPECT TO THE LIMITS OF LIABILITY AND THE DEFINITION OF OWNER/RESPONSIBLE PARTY

"OPA 90 Did Not Repeal the Limitation Act by Implication

> If Congress' intent in enacting OPA 90 had been to completely repeal the Limitation Act, it would not have painstakingly repealed it only with respect to certain types of actions. It is incomprehensible that Congress would have provided for express repeal of the Limitation Act under these limited circumstances if it had intended

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[28] 33 U.S.C. § 2751(e)(1).

> and implied repeal of the Limitation Act in all circumstances. These provisions will be mere surplusage if Congress had intended to totally repeal the Limitation Act."[29]

Notwithstanding the logic of Professor Duncan's foregoing statement, the below Court found that because of the explicit repeal by OPA 90 of certain narrow aspects of the Limitation Act, the entirety of the Limitation Act was implicitly repealed with respect to OPA 90 claims. That holding goes too far.

As was stated more fully above, the Courts strongly disfavor repeals by implication, unless the earlier statute is clearly repugnant or irreconcilable. Congress' intent to repeal must be clear and manifest and the Court will strongly presume that Congress will expressly address in the statute those statutes and sections it wishes to modify. As Professor Duncan stated above, had Congress wished to repeal the Limitation Act with respect to oil spills, it could have expressly stated so in the statute. Instead, Congress' intent to *not* repeal the entirety of the Limitation Act is therefore manifest in their actions where OPA 90 only modifies the Limitation Act with respect to the extent of the specific five subsections in OPA 90.[30]

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[29] W. Duncan, *The Oil Pollution Act of 1990's effect on the Shipowner's Limitation of Liability Act*, 5 U.S.F.L. Rev. 303, 319 (1993).

[30] 33 U.S.C.:

§ 2702(a) which repealed the Limitation Act only as to responsible parties;

§ 2702(d)(1)(A) which repealed the Limitation Act as to third parties who solely caused an oil spill;

§ 2718(a) which repealed the Limitation Act with respect to state and local governments imposing additional liability on any party;

§ 2718(c)(1) which repealed the Limitation Act with respect to the United States or any state or political subdivision thereof from imposing additional liability or additional requirements;

(*footnote continued*)

More importantly, when reviewed in light of its legislative history and purposes, it is clear that OPA 90 did not repeal the *procedure* set forth in the Limitation Act, and that Congress had no intention of doing so. As the Conference Report on OPA 90 makes clear, preexisting law remains unaltered to the extent it was not explicitly modified by OPA 90. It states that:

> "Section 1002 of the Conference substitute establishes *liability* notwithstanding any other provisions or rule of law, including the Act of March 3, 1851(46 U.S.C. § 183) [the Limitation Act]. *Therefore, there is no change in current law unless there is specific provision to the contrary.*"
>
> "It is not the intent of the conferees to change the jurisdiction in incidents that are within the Admiralty and Maritime laws of the United States. *The Conferees wish to promote uniformity regarding these laws.*[31]

This portion of the Conference Report was preserved in OPA 90's savings clause, *codified* at 22 U.S.C. § 2751 which states in pertinent part:

> "(b) **Continuation of regulations**
>
> An order, rule or regulation in effect, under a law replaced by this chapter continues in effect under the corresponding provision of this chapter until repealed, amended or superceded . . .
>
> "(e) **Admiralty and maritime claims**
>
> Except as otherwise provided . . . this chapter does not affect admiralty or maritime law."

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§ 2718(c)(2) which repealed the Limitation Act with respect to the United States or any state or political subdivision thereof from imposing fines or penalties (whether criminal or civil) for violation of any law. See the Oil Pollution Act of 1990's Effect on The Shipowner's Limitation of Liability Act, *supra* at 313.

31 H. R. Ret. 101-653, at 159 (1990) [emphasis added].

As these passages make clear, it is only a responsible party's liability and the limits of a responsible party's liability that are modified by OPA 90, not the limitation procedure, and thus it is only OPA 90's limits on liability that are "established notwithstanding any other provision or rule of law."[32] In short, the legislative history of OPA 90 and OPA 90 itself are devoid of any comments suggesting that OPA 90 was intended to repeal or modify the limitation procedures set forth in Rule F. And since OPA 90 explicitly states that it leaves unaffected traditional admiralty and maritime law, unless such changes are specifically provided for in the statute the only conclusion that can be drawn is that Congress had no such intention.

Furthermore, as noted above, OPA 90 expressly states that except where otherwise provided, OPA 90 does not effect existing admiralty and maritime law.[33] OPA 90, in fact, does not otherwise provide, and neither OPA 90, nor its legislative history, address the issue of limitation procedure. Thus, there can be no other conclusion but that the concursus procedure of Rule F remains applicable to OPA 90 claims, thus creating a workable, and indeed logical, scheme to administer the limitation fund created by Congress with the passage of OPA 90.

CONCLUSION

For the above reasons, the Court should grant Certiorari to the Petitioners because:

1. The enactment of OPA 90 did not repeal Rule F of the Federal Rules of Civil Procedure, there was no mention of supplemental Rule F whatsoever in OPA 90 and specifically no reference to the provision for concursus. Therefore, the Courts below erred when they ruled that Rule F was implicitly repealed by the OPA 90 statute; and

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[32] 33 U.S.C. § 2702(a).

[33] 33 U.S.C. § 2751(e)(1).

2. The enactment of the OPA 90 did not repeal the Limitation Act, it only modified the limitation with regard to the liability limits and third parties.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1321

IN THE MATTER OF: THE COMPLAINT
OF METLIFE CAPITAL CORP., ETC.,

Plaintiff-Appellant,

COMMONWEALTH OF PUERTO RICO, ET AL.,

Plaintiffs-Appellees,

v.

M/V EMILY S., ETC., ET AL.,

Defendants-Appellees.

No. 97-1322

IN THE MATTER OF: BUNKER GROUP, INC., ET AL.,

Plaintiffs-Appellants,

COMMONWEALTH OF PUERTO RICO, ET AL.,

Plaintiffs-Appellees,

v.

M/V EMILY S., ETC., ET AL.,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. CARMEN CONSUELO CEREZO, *U.S. DISTRICT JUDGE*]

Before:

Torruella, *Chief Judge*,
Lynch, *Circuit Judge*,
and Keeton,[*] *District Judge*.

Michael Mirandē, with whom *Robert F. Bakemeier*, *Bogle & Gates P.L.L.C.*, *José E. Alfaro-Delgado* and *Calvesbert, Alfaro & López-Conway* were on brief for appellant Metlife Capital Corporation.

John M. Woods, with whom *Andrew J. Garger*, *Thacher Proffitt & Wood*, *William A. Graffam*, *Patricia A. Garrity* and *Jiménez Graffam & Lausell* were on brief for appellant Bunker Group, Inc.

Mee Lon Lam, Trial Attorney, Torts Branch, Civil Division, U.S. Department of Justice, with whom *Frank W. Hunger*, Assistant Attorney General, Civil Division, and *Guillermo Gil*, United States Attorney, were on brief for appellee United States of America.

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* Of the District of Massachusetts, sitting by designation.

Antonio J. Rodríguez, with whom *Rice Fowler*, *José A. Fuentes-Agostini*, Attorney General, Commonwealth of Puerto Rico, *John F. Nevares* and *Smith & Nevares* were on brief for appellee Commonwealth of Puerto Rico.

December 24, 1997

TORRUELLA, *Chief Judge*. These two actions, consolidated for appeal, challenge the district court's ruling that the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-61, repealed the Limitation of Shipowner's Liability Act of 1851 ("Limitation Act"), 46 U.S.C. app. §§ 181-96, as to oil spill claims for removal costs and damages arising under the OPA. We hold that claims arising under the OPA (for pollution removal costs and damages) are not subject to the substantive or procedural law of the Limitation Act or to the concursus of claims under Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure ("Rule F").

I. BACKGROUND

On January 7, 1994, the towing wire between the tug M/V EMILY S and the barge MORRIS J. BERMAN parted, grounding the barge off of Punta Escambrón, San Juan, Puerto Rico. The grounding caused much of the MORRIS J. BERMAN's cargo of fuel oil to spill into the waters of the Commonwealth of Puerto Rico (the "Commonwealth"). Soon after the spill, the Commonwealth filed a damages action in the United States District Court for the District of Puerto Rico naming numerous defendants including: (i) the demise charterer of the EMILY S Bunker Group, Inc. ("BGI");

(ii) the operator of the EMILY S Bunker Group Puerto Rico, Inc. ("BGPR"); (iii) the owner and operator of the MORRIS J. BERMAN and the co-demise charterer of the EMILY S New England Marine Services ("NEMS"); (iv) the owner of the EMILY S MetLife Capital Corporation ("MetLife"); and (v) the EMILY S *in rem*. The Commonwealth arrested the EMILY S and sought damages under the OPA, general federal maritime law, and Puerto Rico law. Subsequently, several other civil actions were filed in the District of Puerto Rico by private parties seeking recovery under a variety of theories for damages. Each of these actions was either consolidated with the Commonwealth's action or dismissed.

Within six months of the oil spill, the appellants NEMS, BGI, and BGPR (collectively, the "Bunker Group") filed a complaint under the Limitation Act and Rule F, seeking exoneration from or limitation of liability. At the same time, the appellant MetLife, as owner of the EMILY S, filed a separate action under the Limitation Act. On August 25, 1994, the district court issued a notice to claimants of the limitation actions and an order of injunction, or monition, enjoining the commencement of any actions against the limitation plaintiffs for claims arising out of the grounding of the barge except for actions filed in the limitation proceeding. The monition created a concursus of all claims in a single consolidated proceeding. NEMS, BGI, BGPR, and MetLife (the "Limitation Plaintiffs") provided notice to actual claimants as well as to potential claimants in a Notice of Monition in the newspaper *El Nuevo Día* on August 26, 1994, directing them to file their claims on or before October 15, 1994.

At the conclusion of the monition period, the Limitation Plaintiffs filed motions for entry of default against all persons who failed to file. Subsequently, numerous claimants, including the Commonwealth and the United States (the "Government"), filed actions in the limitation proceedings, seeking recovery of damages under the OPA, general maritime law, and other law. In their claims, both the Commonwealth and the Government asserted that their OPA claims should not be subject to concursus.

Three other claimants, Hilton International of Puerto Rico, Inc., Puerto Rico Tourism Company, and Hotel Development Corporation (collectively, the "Hilton claimants"), filed claims under seal in the limitation proceedings while their administrative claims, which had already been filed with the National Pollution Funds Center ("NPFC"), were pending. The Hilton claimants simultaneously moved the district court for relief in order to preserve their OPA claims if they withdrew them from the concursus. On June 28, 1996, the district court issued an order suspending the August 25, 1994 order of injunction issued in the limitation proceedings. This order allows "any claims for oil spill removal costs or damages resulting from or in any way connected with the grounding of the barge MORRIS J. BERMAN on January 7, 1994 to be asserted independently of the limitation of liability proceedings." Subsequent to the issuance of the order, the Hilton claimants withdrew their limitation claims in order to proceed with their administrative claims before the NPFC. However, their motions served as the vehicle for all parties to brief the question now presented to this court. On August 7, 1996, the appellants NEMS, BGI, BGPR, and MetLife timely filed this appeal of the June 28, 1996 order.

II. DISCUSSION

Interpretations of federal statutes and rules are subject to *de novo* review. *See Strickland* v. *Commissioner, Me. Dept. of Human Servs.*, 96 F.3d 542, 545 (1st Cir. 1996).

A. The Limitation Act and the OPA

The Limitation Act was enacted in 1851 to promote shipbuilding and to induce investment in the growing American shipping industry. *See Hartford Accident & Indem. Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927). The law permits the shipowner to limit his or her liability as to certain claims for damages arising out of the voyage of his or her vessel to the

post-accident value of the vessel plus pending freight. *See* 46 U.S.C. §§ 183, 186.

Rule F governs the filing and adjudication of a limitation action. The vessel owner must file a complaint no later than six months after receipt of a claim as well as depositing the amount of the limitation fund with the court. *See* Rule F(1). Rule F concursus, once referred to as the "heart" of a limitation action, *Maryland Cas. Co.* v. *Cushing*, 347 U.S. 409, 417 (1954), requires multiple claimants to pursue relief in a single forum and marshals the assets of a limited fund. *See* Rule F(3), F(7). Concursus is intended to provide a "prompt and economical disposition to controversies." *Cushing*, 347 U.S. at 415. Today, many question the continued usefulness and vitality of the Limitation Act. *See, e.g.*, 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994) (the Limitation Act's "original purpose . . . seems to have lost much of its force with the availability of insurance, bills of lading statutes that put substantial limits on liability for cargo loss, and the ability to limit claims by contract"). However, Congress has never repealed the act, and therefore, courts continue to apply it. *See, e.g., Keller* v. *Jennette*, 940 F. Supp. 35 (D. Mass. 1996).

The Oil Pollution Act was passed in the wake of the 1989 Exxon Valdez tanker disaster and created a more comprehensive compensation and liability scheme for oil spill pollution than had existed under earlier legislation. Prior to the OPA, the Federal Water Pollution Control Act ("FWPCA") (commonly known as the Clean Water Act), 33 U.S.C. §§ 1251-1387, provided liability limitations for federal pollution removal costs associated with oil spills. *See id.* § 1321(c). The OPA imposes strict liability for pollution removal costs and damages on the "responsible party" for a vessel or a facility from which oil is discharged. *See* 33 U.S.C. § 2702(a). Responsible parties include owners, operators, or demise charterers of a vessel. *See id.* § 2701(32).

The OPA limits the liability of responsible parties based upon the type of vessel and its tonnage. For tank vessels, the

limit can be as high as $10 million. *Id.* § 2704(a)(1). For all other vessels, the limit is the greater of $600 per gross ton or $500,000. *Id.* § 2704(a)(2). Responsible parties may face unlimited liability for, *inter alia*, acts of gross negligence or willful misconduct. In addition, state law applies free of these liability limits. *See id.* §§ 2718(a), 2718(b). Finally, the OPA consolidated previously established oil pollution funds into the Oil Spill Liability Trust Fund (the "Fund"), which pays claims brought under the OPA after they have first been presented to the responsible party, if the responsible party is entitled to a defense, or the liability limit under the statute has been reached. *See* 33 U.S.C. §§ 2708(a), 2713(b)(1)(B). *See generally* Schoenbaum, *supra*, at 384.

B. The OPA's Impact on the Limitation Act

The OPA specifically addresses its relationship with the Limitation Act and other legislation when it states:

> *Notwithstanding any other provision or rule of law*, and subject to the provisions of this chapter, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, . . . is liable for the removal costs and damages specified in subsection (b) that result from such incident.

33 U.S.C. § 2702(a) (emphasis added). Appellant MetLife asserts that this provision imposes the OPA's increased liability limits notwithstanding any previously applicable *limitations* under the Limitation Act, but does not eviscerate preexisting limitation *procedure* under the Limitation Act. Thus, the appellant argues, Limitation Act concursus remains available to responsible parties.

However, a plain reading of the subsection suggests that the OPA repealed the Limitation Act with respect to removal cost and damages claims against responsible parties. *See In re JAHRE SPRAY II K/S*, 1996 WL 451315, *4 (D.N.J. 1996);

accord In re Odin Marine Corp., No. 96-5438, slip op. at 6 (S.D.N.Y. Aug. 7, 1997); *Tug Capt. Fred Bouchard Corp.* v. *M/V BALSA 37*, No. 93-1321, slip op. at 2 (M.D. Fla. Oct. 22, 1996). Accordingly, the procedural rules incorporated into the Limitation Act are inapplicable as well to such claims. In interpreting similar language in the FWPCA, courts have held that the statute's "notwithstanding" phrase precludes application of the Limitation Act to claims by the United States for FWPCA pollution removal costs. *See In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981); *In re Hokkaido Fisheries Co., Ltd.*, 506 F. Supp. 631, 643 (D. Alaska 1981). *See also Schoenbaum, supra*, at 376 ("OPA broadly supersedes the Limitation of Liability Act with respect to damages and removal costs under both federal and state law, including common law"). We find these cases to be persuasive because "[n]either the language of OPA nor its legislative history suggests that OPA's provisions should be construed contrary to the settled law applicable to FWPCA when OPA was enacted." William M. Duncan, The Oil Pollution Act of 1990's Effect on the Shipowner's Limitation of Liability Act, 5 U.S.F. L. Rev. 303, 316 (1993).

In addition to the "notwithstanding" clause, at least four other provisions in the statute explicitly repeal the Limitation Act with respect to certain types of claims. *See* 33 U.S.C. §§ 2702(d)(1)(A) (repealing the Limitation Act as to third parties solely responsible for a spill); 2718(a) (repealing the Limitation Act as to state and local statutory remedies); 2718(c)(1) (repealing the Limitation Act as to additional liability imposed by the United States, any state, or political subdivision); 2718(c)(2) (repealing the Limitation Act as to fines or penalties). The appellants contend that, outside of these specific instances, the Limitation Act continues to apply to the OPA. The Bunker Group, citing one commentator, notes that "[i]f Congress' intent in enacting OPA had been to completely repeal the Limitation Act, it would not have painstakingly repealed it only with respect to certain types of actions." Duncan, *supra*, at 319.

When we consider these five OPA provisions which explicitly repeal the Limitation Act as well as others that are irreconcilably in conflict, *see infra*, we find that the OPA has repealed the Limitation Act as to oil spill pollution claims arising under the OPA in the instant case. " '[W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one . . . .' " *See Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936) (noting standard for repeal by implication)).

While the repeal of statutes by implication is disfavored, *see Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 189 (1978), several key provisions of the two statutes are plainly inconsistent. First, the Limitation Act limits the shipowner's liability to the post-accident value of the vessel plus pending freight, 46 U.S.C. § 183, while the OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels and $.5 million for all other vessels. 33 U.S.C. §§ 2702, 2704. Moreover, in certain instances, the OPA imposes virtually unlimited liability on the responsible party. *See* 33 U.S.C. §§ 2704(c). Second, the provisions on jurisdiction are in obvious tension. Only federal courts have jurisdiction over limitation proceedings. *See, e.g., Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988). In contrast, the OPA grants federal *and state*courts jurisdiction to decide oil pollution cases. 33 U.S.C. §§ 2717(b), 2717(c). Finally, the provisions of Rule F, the procedural rule that implements and which is incorporated into the Limitation Act, cannot be reconciled with sections of the OPA. *See* Part C, *infra*.

Even assuming *arguendo* that the language is ambiguous, the legislative history is consistent with our interpretation. As this court has noted, the "chief objective of statutory interpretation is to give effect to legislative will." *Passamaquoddy Tribe* v. *State of Me.*, 75 F.3d 784 (1st Cir. 1996). In considering the OPA's liability provision, Congress stated:

> Liability under this Act is established notwithstanding any other provision or rule of the law. This means that the liability provisions of this Act would govern limitations compensation for removal costs and damages notwithstanding any limitations under existing statutes such as the act of March 3, 1851 . . . .

H.R. Conf. Rep. No. 101-653, at 103 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 781 (Joint Explanatory Statement of the Conference Committee explaining § 2702(a)). Furthermore, the Senate Report on the OPA bill asserts that the OPA "completely supersedes the 1851 statute with respect to oil pollution." S. Rep. No. 101-94, at 14, *reprinted in* 1990 U.S.C.C.A.N. 722, 736.

More generally, as the Ninth Circuit reasoned in finding an implicit repeal of the Limitation Act by the liability provisions of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655, "[a]pplication of the Limitation Act to [the OPA] would frustrate completely [the OPA]'s comprehensive remedial nature." *See In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991). "The purpose of OPA, as well as other remedial legislation passed by Congress and the states to address environmental disasters such as oil spills, was to encourage rapid private party responses." *JAHRE SPRAY*, 1996 WL 451315, at *4. However, the Limitation Act "allows vessel owners virtually to eliminate liability for catastrophic damages." *Glacier Bay*, 944 F.2d at 583. Hence, the OPA's scheme is in irreconcilable conflict with the Limitation Act.

Some claims arising from an incident in which oil pollution occurs do not escape the Limitation Act. For example, that Act remains in force for general maritime claims such as maritime tort actions for harms to persons or vessels. *See* 33 U.S.C. § 2751(e) ("[e]xcept as otherwise provided in this chapter, this chapter does not affect . . . admiralty and maritime law"). The district court below, in keeping with the OPA's savings provision in § 2751(e), reserved the Limitation Plaintiffs' right "to seek limitation of liability for those

claims subject to reduction under the Limitation Act." Therefore, the Bunker Group's contention that the district court's order exempts from Rule F concursus all claims arising from the grounding, whether or not they arise under the OPA, is without merit. The appellants remain free to avail themselves of the Limitation Act and Rule F concursus for their non-OPA claims.

C. The Independent Application of Rule F Concursus

The appellants claim that even if the OPA supersedes the Limitation Act, because the OPA fails to provide any guidance on the procedure necessary to implement it, Rule F concursus applies to actions under the OPA independently of the Limitation Act. To support their contention, the appellants note that Rule F is framed generally to address "limitation of liability pursuant to *statute*." Rule F(1). Rule F was originally written by the Supreme Court to implement the 1851 Limitation Act. In redrafting the rules, the Supreme Court substituted a direct reference to the 1851 statute in Rule F with the "pursuant to statute" language, which we find reveals a more general purpose for Rule F.

We conclude, however, that Rule F's requirements on venue and limitation of liability cannot be reconciled with the OPA's provisions regarding oil spill damages. Under Rule F, a limitation of liability proceeding may be commenced only in the district where the vessel has been seized, or if the vessel has not been seized, in any district in which the owner has been sued. *See* Rule F(9). If neither the vessel has been seized nor action commenced against the owner, the limitation action may be filed in the district where the vessel may be. *See id.* Venue is proper in any district only if there is no pending litigation and the vessel is not within any district. *See id.* Under the OPA, in contrast, venue is proper in any district in which the discharge of oil or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. 33 U.S.C. § 2717(b). Thus, the OPA offers claimants a much

broader choice of forums while Rule F's venue requirements are significantly more restrictive.

Rule F's deadline for claims is also inconsistent with the OPA's statute of limitation. Once a limitation action is commenced, the court issues a notice to claimants requiring them to file their claims by the date fixed in the notice. *See* Rule F(4). The court may fix a date that requires claims to be filed in as little as 30 days after issuance of the notice. *Id.* In the instant case, the monition period terminated approximately ten months after the date of the MORRIS J. BERMAN's grounding. The OPA, however, allows claimants three years to commence an action to recover removal costs and damages. *See* 33 U.S.C. §§ 2717(f)(1), 2717(f)(2). In addition, if the claimant decides to seek recovery from the Fund, the claimant has six years to present removal costs claims, *see* 33 U.S.C. § 2712(h)(1), and three years to present damage claims. *See id.* § 2712(h)(2). Finally, section 2717(f)(4) extends the limitation period for subrogation actions by three years from the date the Fund pays a subrogated claim. *See* 33 U.S.C. § 2717(f)(4).

One concern we have with the shortened claims period under Rule F is that it would interfere with the United States' subrogation rights under the OPA. If oil spill claims are subject to Rule F concursus, claimants who are barred by the court imposed deadline from recovering against the responsible party, are likely to present their claims to the Fund. Once the Fund pays a claim, the United States acquires all rights of subrogation. *See* 33 U.S.C. §§ 2712(f), 2713, 2715(a). However, at that point, the United States may then be denied access to the proceedings against the responsible party, and consequently, the Fund will bear the financial burden of these late claims.

The appellants respond that, under Rule F, the government's subrogation rights do not necessarily lapse because "[f]or cause shown, the court may enlarge the time within which claims may be filed." Rule F(4). We believe though that subjecting the government's subrogation rights to the dis-

cretion of the trial court in every oil spill action fails to adequately secure those rights. Congress specifically examined this issue in creating the OPA's statute of limitation and giving the courts discretion over this matter is contrary to legislative intent. Moreover, even if the courts consistently enlarge the monition period for subrogation claims, in many instances, the limited fund established by the concursus procedure will already have been exhausted.

Finally, contrary to the appellants' contention that the OPA fails to provide *any* procedural guidance, the OPA does establish a claims procedure. The OPA requires all claims for removal costs or damages to be presented first to the responsible party or guarantor. *See* 33 U.S.C. § 2713(a). If the responsible party denies liability or the claim is not settled within 90 days, the claimant may proceed against the responsible party in court or present the claim to the Fund. *See id.* § 2713(c). In some enumerated instances, claims may be presented directly to the Fund without first presenting them to the responsible party. *See id.* § 2713(b). "The purpose of the claim presentation procedure is to promote settlement and avoid litigation." *Johnson* v. *Colonial Pipeline Co.*, 830 F. Supp. 309, 310 (E.D. Va. 1993). In contrast to the OPA's claims procedure, Rule F forces all claimants into litigation against the vessel owner. If a claimant fails to appear in the limitation action within the monition period, he or she is enjoined from raising any claims. *See* Rule F(3). In view of these inconsistencies, we conclude that Rule F concursus even if independent of the Limitation Act is inapplicable to OPA claims.

III. CONCLUSION

For the reasons stated in this opinion, the district court's order is *affirmed*.

Costs to be assessed against appellants.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil 94-1019CCC

THE COMMONWEALTH OF PUERTO RICO ON ITS OWN BEHALF, AND AS PUBLIC TRUSTEE AND AS *PARENS PATRIAE* FOR THE CITIZENS OF THE COMMONWEALTH, THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO AND THE DEPARTMENT OF NATURAL RESOURCES OF THE COMMONWEALTH OF PUERTO RICO,

Plaintiffs

vs

THE M/V EMILY S AND THE BARGE MORRIS J. BERMAN, *IN REM*; METLIFE CAPITAL CORPORATION, PETER FRANK, BUNKER GROUP, INC.; PARK LANE ASSOCIATES, PEDRO RIVERA, NEW ENGLAND MARINE SERVICES, INC., ABC INSURANCE COMPANY AND DEF INSURANCE COMPANY *in personam*,

Defendants

YAACOV EISAK

Intervening Plaintiff

RAUL HORTA-GONZALEZ, DIEGA CASTILLO-HERNANDEZ, ADOLFO ARNAU-SANCHEZ, ROSA ALDAY-DE-ARNAU,

MARI RODRIGUEZ-HERRERO, LILIAN RODRIGUEZ-HERRERO, MAITE MALDONADO-HERNANDEZ, MARGARITA RIVERA-MARRERO, ANTONIO RODRIGUEZ-RODRIGUEZ, MARTINA ESPIRIO-ROSARIO, FERNANDO BIASCOCHEA, LUCIA POLANCO-MARTINEZ, RAFAELA CASTILLO-DE-PAULA, PEDRO UMPIERRE, HECTOR SANFELIS, EDDIE MEJIAS, ROGELIO GONZALEZ, UCRANIA MARTINEZ-POLANCO, JACINTA ACOSTA-ALCEQUIEZ, ISABEL MARTINEZ-DE-LA-CRUZ, EDUARDO FELIZ-REYES, JUAN VALERIO FLORIO-GONZALEZ, MARIA ARAYA-GONZALEZ, DANIEL NIEVES-MOLINA, DULCE MARIA CONTRERAS, OLIVIA FERNANDEZ-GRULLON, JORGE ESPINOSA, CRISTINA BARNE, MARIA A. PEÑA-CARRASCO, AMALIA PEREZ, ALTAGRACIA LOPEZ and JORGE LUIS MATOS,

Plaintiffs representative of proposed class

CIVIL 94-1047CCC

CAFE ST. ELMO, INC., HAVANA SAN JUAN CORP., OASIS RESTAURANT, INC., EDDIE MEJIAS d/b/a SOUVENIR SHOP,

Individual Plaintiffs

VS

THE TUG EMILY S, and the Barge MORRIS J. BERMAN,

Defendants *in rem*

A. CLYDE PRUITT; EMILY S. PRUITT, PETER FRANK; JOHN DOE and/or RICHARD DOE; NEW ENGLAND MARINE SERVICES, INC; EVELYN BERMAN FRANK, SUSAN FRANK; JIM DOE and/or SAM DOE; STANDARD TANK CO.; PETER DOE; BUNKERS GROUP OF PUERTO RICO; CARIBBEAN PETROLEUM CORPORATION; JIMMY DOE;

INSURANCE COMPANIES and/or P & I CLUBS "A" THROUGH "J",

Defendants *in personam*

CIVIL 94—1058CCC

ESCAMBRON BEACH CLUB, INC.,

Plaintiff

vs.

M/V EMILY S., BARGE MORRIS J. BERMAN, *IN REM*; NEW ENGLAND MARINE SERVICES, INC., A. CLYDE PRUITT; EMILY S. PRUITT, DOE COMPANY, RICHARD ROE,

Defendants

CIVIL 94-1919CCC

IN THE MATTER OF THE COMPLAINT OF METLIFE CAPITAL CORPORATION, as owner of the Tub "EMILY S," for Exoneration from or Limitation of Liability

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ORDER

Having considered the Petition for Dismissal or Stay of Proceedings filed by the Puerto Rico Tourism Company (Tourism Company) and the Hotel Development Corporation (HDC) **(docket entry 152)**, the Joint Motion to Amend Order and Notice; to Stay Proceedings; or in the Alternative, to

Relax the Monition Period filed by Hilton International of Puerto Rico, Inc. (Hilton) and HDC **(docket entry 153)**, the Memorandum in Opposition filed by Metlife Capital Corporation **(docket entry 193)**, the Memorandum in Opposition filed by Bunker Group, Inc. (BGI), New England Marine Services, Inc. (NEMS) and Bunker Group Puerto Rico, Inc. (BGPR) **(docket entry 195)**, the memoranda filed by both the United States of America **(docket entry 230)** and the Commonwealth of Puerto Rico **(docket entry 232)** regarding the issue of whether claims for removal costs and damages of the kinds specified in the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990), 33 U.S.C. § 2701 *et. seq.* (hereinafter "oil pollution removal costs and damages") caused by, resulting from or in any way connected with the grounding of the barge MORRIS J. BERMAN on January 7, 1994 may be subjected to the substantive or procedural laws of the Shipowner's Limitation of Liability Act of March 3, 1851 (the Limitation Act), 46 U.S.C. § 183 *et. seq.*, Rule F(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, or this Court's Order of Injunction Restraining Prosecution of Claims Pursuant to Rule F(3) of the Federal Rules of Civil Procedure entered on August 25, 1994 (Order of Injunction), as well as the Reply by the Bunker Group Limitation Plaintiffs to the Motions Filed by the Commonwealth of Puerto Rico and the United States filed by BGI, NEMS and BGPR **(docket entry 285)**, Hilton and HDC's Surreply to Bunker Group's Reply **(docket entry 298)** and Puerto Rico Tourism Company's Motion Joining in Favor of Hilton and HDC's Surreply to Bunker Group's Reply **(docket entry 299)**,

IT IS HEREBY ORDERED that the August 25, 1994 Order of Injunction is hereby suspended to the extent that it stays any claims for oil spill removal costs or damages resulting from or in any way connected with the grounding of the barge MORRIS J. BERMAN on January 7, 1994,

IT IS FURTHER ORDERED that the NOTICE TO CLAIMANTS OR COMPLAINTS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AND ORDER OF MONITION entered by the Court on August 25, 1994 is hereby modified to allow any claims for oil spill removal costs or damages resulting from or in any way connected with the grounding of the barge MORRIS J. BERMAN on January 7, 1994 to be asserted **independently** of the limitation of liability proceedings consolidated with Civil No. 94-1019CCC, in accordance with applicable law. The limitation plaintiffs will retain the right to seek limitation of liability for those claims subject to reduction under the Limitation Act.

Given the Court's disposition as outlined above, both the Petition for Dismissal or Stay ofl Proceedings filed by the Tourism Company and (HDC) (**docket entry 152**) and the Joint Motion to Amend Order and Notice; to Stay Proceedings; or in the Alternative, to Relax the Monition Period filed by (Hilton) and HDC (**docket entry 153**) are hereby DENIED AS MOOT.

SO ORDERED.

At San Juan, Puerto Rico, on June 28, 1996.

CARMEN CONSUELO CEREZO
Chief, U.S. District Judge